No. 99-474

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Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF MEMBERS OF CONGRESS, AMICI CURIAE: SEN. PAUL WELLSTONE & REPS. NEAL ABERCROMBIE, TAMMY BALDWIN, HOWARD BERMAN, XAVIER BERCERRA, DAVID BONIOR,

(Additional Members of Congress Listed on Inside Cover)

IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

May federal courts strike down state procurement laws such as the Massachusetts Burma law as conflicting with federal control over foreign affairs and foreign commerce when Congress has repeatedly refused to preempt such laws?

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INTEREST OF AMICI CURIAE * & SUMMARY OF ARGUMENT

This case deals directly with the authority of Congress to decide whether or not to preempt state law. As members of Congress, *amici curiae* are concerned that unless it is reversed, the decision of the court of appeals in this case will encroach upon that congressional authority. Specifically, *amici curiae* are concerned that the court of appeals failed to defer to Congress's decision not to preempt state and local selective purchasing laws such as the Massachusetts Burma law. In addition, *amici curiae* are concerned that the court of appeals failed to properly apply this Court's decision in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994), in which this Court held that Congress has the primary authority under the Constitution to determine whether to preempt state law based upon foreign policy or foreign commerce concerns.

Amici curiae have authorized this brief to be filed in their names by virtue of individual letters on file with counsel. Counsel to the petitioner, Commonwealth of Massachusetts, and counsel to the respondent, National Foreign Trade Council, has consented to the filing of this *amicus* brief.

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* As required under Supreme Court Rule 37.6, counsel on this brief disclose that counsel for a party did not author any part of this brief. Funding for preparation of this brief was provided through the institutional support of Georgetown University for the Harrison Institute for Public Law, which is a program for clinical legal education and public interest representation.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *BARCLAYS BANK*, WHICH RECOGNIZES THAT THE CONSTITUTION VESTS CONGRESS, NOT THE FEDERAL COURTS, WITH THE AUTHORITY TO DETERMINE WHETHER TO PREEMPT STATE LAW ON FOREIGN POLICY OR FOREIGN COMMERCE GROUNDS

In this case a "United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." United States Supreme Court Rule 10(c). The decision of the court of appeals in this case conflicts with this Court's decision in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994).

At issue in this case is the Massachusetts Burma law, a "selective purchasing law" which discourages state agencies from doing business with companies that do business in Burma. M.G.L.A. ch. 7, § 22.[1] Although the federal sanctions targeting Burma make no reference to state and local legislation, the court of appeals held that the federal Burma sanctions preempt the Massachusetts Burma law, and that the Massachusetts Burma law encroaches upon the federal power over foreign affairs and foreign commerce.

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[1] More specifically, the law authorizes the state Operational Services Division to establish a list of companies "doing business with Burma." A state agency may purchase from a company that is on the list only if: (1) the procurement is essential and the restriction would eliminate the only bid or offer, or would result in inadequate competition (*Id.*, § 22H(b); (2) the Commonwealth is purchasing certain medical supplies (*Id.*, § 221); or (3) there is no "comparable low bid or offer" by an unrestricted bidder (*Id.*, § 22H(d)).

The decision of the court of appeals conflicts with this Court's decision in *Barclays Bank* holding that Congress, not the federal courts, has the primary constitutional authority to determine whether to preempt state law based upon foreign commerce and foreign policy considerations. As discussed below, Congress has repeatedly refused to exercise its authority to preempt the Massachusetts Burma law and other state and local selective purchasing laws, and the federal courts should not substitute their judgment for that of Congress on this matter.

I. Congress Has Chosen Not to Preempt the Massachusetts Burma Law and Other Similar State and Local Selective Purchasing Laws

This Court has made it clear that when Congress intends to intrude upon an area of traditional state power—such as the procurement power being exercised under the Massachusetts Burma law—"it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).[2] Congress has not only refused to make any statement (let alone a "clear statement") of intent to preempt state and local selective purchasing laws such as the Massachusetts Burma law, it has repeatedly expressed support for such measures.

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[2] Rather than applying the "clear statement" standard, the court of appeals applied a "strong presumption that [Congress] intended to preempt the field . . . ." Pet. App. at 70. As the Solicitor General has recently noted, this standard "contrasts sharply" with the Ninth Circuit's analysis of the preemption of state laws affecting foreign commerce in *International Association of Tanker Owners v. Locke*, 148 F.3d 1053 (9th Cir. 1998). *See* Reply Brief for the United States, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, United States v. Locke (No. 98-1701). This Court has granted certiorari in that case. 68 USLW 3152 (U.S. Sept. 10, 1999) (No. 98-1701, 98-1706).

The Massachusetts Burma law is part of a tradition of state and local selective purchasing and investment laws, including measures that have restricted business with companies doing business in South Africa, Cuba [3] and Northern Ireland,[4] as well as the recent actions by numerous state and local governments concerning the refusal of Swiss Banks to return the assets of Holocaust victims.[5] Despite the controversy surrounding the measures, Congress has repeatedly and deliberately refused to exercise its authority to preempt them.

Congress first addressed the issue almost fifteen years ago in the context of proposals to preempt state and local selective purchasing laws concerning South Africa. Sen-

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[3] *See, e.g.*, Fla. Stat. Ann. §§ 215.471-472 (West Supp. 1998).

[4] Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 Nw J. Int'l L. & Bus. 563, 568 (1993) ("Fourteen states, including Connecticut, Massachusetts, New Jersey, New York, and Rhode Island, and 34 cities have enacted advisory or mandatory divestment laws directed towards firms that have business relationships with Northern Ireland.")

[5] *See, e.g., Testimony of New York State Comptroller H. Carl McCall before the United States Senate Committee on Banking, Housing, and Urban Affairs* (July 22, 1998) 1998 WL 413309 (F.D.C.H.); *Testimony of Under Secretary of State Stuart E. Eizenstat before the House International Relations Committee* (June 3, 1998) 1998 WL 288972 (F.D.C.H.); *Testimony of William C. Lane, Washington Director of Government Affairs, Caterpillar Inc., on Behalf of USA*Engage, Before the Subcommittee on International Economy Policy, Export and Trade Promotion, Senate Foreign Relations Committee* (Mar. 25, 1998) 1998 WL 169595 (F.D.C.H.); *Testimony for Under Secretary Stuart Eizenstat Before the Trade Subcommittee of the House Ways and Means Committee* (Oct. 23, 1997) 1997 WL 667739 (F.D.C.H.); *Statement of Willard M. Berry, President, European-American Business Council before the House Ways and Means Committee Subcommittee on Trade—"The Use and Effectiveness of Unilateral Trade Sanctions"* (Oct. 23, 1997) 1997 WL 679201. (F.D.C.H.)

ator Roth circulated an amendment to the Anti-Apartheid Act of 1985 that would have preempted state and local measures, but he never introduced the amendment because it faced certain defeat. *See Statement of Senator Edward Kennedy*, 132 Cong. Rec. S23291 (Sept. 15, 1986). The Comprehensive Anti-Apartheid Act of 1986 did not contain any reference to state and local sanctions. In response to an "eleventh hour" claim that the 1986 Act would preempt state and local measures (*id.*), the House of Representatives overwhelmingly passed a resolution stating that it did not intend to preempt such laws. The resolution stated that

> It is not the intent of the House of Representatives that the [federal anti-apartheid law] limit, preempt, or affect, in any fashion, the authority of any state or local government . . . to restrict or otherwise regulate any financial or commercial activity respecting South Africa.

H.R. Res. 548 and 549, 99 Cong., 2d Sess. (1986).

The resolution was passed after heated debate concerning the propriety of such state and local measures. *See* 132 Cong. Rec. H6758-03, H6768-05 (Sept. 12, 1986).

Not only did Congress refuse to preempt state and local anti-Apartheid laws, it voted to permit state and local governments to condition the award of contracts for federally funded transportation projects on compliance with these laws. Prior to enactment of the Comprehensive Anti-Apartheid Act of 1986, the Department of Transportation had withheld millions of dollars in federal funds from state and local jurisdictions with selective purchasing laws concerning South Africa on the grounds that these laws violated the requirement that state and local government contracts using federal funds be awarded to the lowest bidder. *See Board of Trustees v. Mayor and*

City Council of Baltimore, 317 Md. 72, 117 n. 45, 562 A.2d 720, 742 n. 45 (1989), *cert. denied*, 493 U.S. 1093 (1990).[6]

Congress responded by including a provision in the Comprehensive Anti-Apartheid Act of 1986 that waived the lowest-bidder requirement as applied to state and local anti-apartheid laws for 90 days. *See* Pub. L. 99-440, Oct. 2, 1986, 100 Stat. 1089, § 606. Three years later, Congress voted to permanently permit federal funds to be used for state and local transportation projects that were subject to South Africa procurement laws. *See* Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. 101-45, June 30, 1989, 103 Stat. 97 (undesignated paragraph entitled "State and Local Anti-Apartheid Policies"). That provision was repealed in 1993 by the South African Democratic Transition Support Act, which repealed most of the federal sanctions on South Africa in response to that country's movement towards democracy. *See* Pub. L. 103-149, Nov. 23, 1993, 107 Stat. 1503.

Yet despite its determination that the federal sanctions and the waiver of the lowest-bidder requirement for state

[6] In *Board of Trustees*, the Maryland Court of Appeal rejected a challenge to Baltimore City ordinances that required city pension funds to divest their holdings in companies that did business in South Africa. As with the National Foreign Trade Council (NFTC)'s challenge to the Massachusetts Burma law, the plaintiffs in *Board of Trustees* argued that the ordinances violated the federal foreign affairs and commerce powers and were preempted. The court of appeals treatment of these issues in this case conflicts with the Maryland Court of Appeals analysis in *Board of Trustees*. Accordingly, granting the petition for certiorari is appropriate. *See* United States Supreme Court Rule 10(a) (certiorari may be appropriate when "a United States court of appeals has . . . decided an important federal question in a way that conflicts with a decision by a state court of last resort . . . .")

and local governments were no longer appropriate, Congress still refused to preempt state and local sanctions. Instead, Congress merely *encouraged* state and local governments (along with participants in private boycotts) to rescind their South Africa measures.[7]

Congress has proven no more willing to preempt the Massachusetts Burma law and the various state and local measures concerning the assets of Holocaust victims. Congress imposed sanctions on Burma in 1996, three months after the Massachusetts law was enacted. The federal sanctions conspicuously fail to mention state and local measures let alone express any intent to preempt them, and no legislation preempting state and local Burma laws has subsequently been introduced. *See Omnibus Consolidated Appropriations Act of 1997*, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 through 3009-167 (§ 570) (1996). This failure to address state and local measures cannot be dismissed as an oversight. In recent years, prompted by the controversy over the state and local measures regarding Burma, Swiss banks and South Africa, Congress has engaged in vigorous debate concerning state and local selective purchasing laws. *See* 145 Cong. Rec. H7368-73 (August 5, 1999); 144 Cong. Rec. E1631-03 (August 7, 1998); 144 Cong. Rec. H7262-02, H7278, H7279, H7280-85 (Aug. 6, 1998).

Similarly, sanctions reform legislation introduced in recent years has not addressed state and local measures. *See* H.R. 1244, 106th Cong., 1st Sess. (1999); S. 757, 106th Cong., 1st Sess. 1999); H.R. 2708, 105th Cong., 2d Sess. (1997); S. 1413, 105th Cong., 1st Sess. (1997).

[7] "The Congress urges all State or local governments and all private entities in the United States that have adopted any restriction on economic interactions with South Africa, or any policy discouraging such interaction, to rescind such restriction or policy." Pub. L. 103-149, Nov. 23, 1993, 107 Stat. 1503 § 4(c)(1).

The omission was intentional. The lead sponsors of the bill in both the House and the Senate have criticized state and local selective purchasing laws such as the Massachusetts Burma law[8]—yet their Sanctions Reform Act fails to address state and local measures.[9] Plaintiff in this action—the National Foreign Trade Council—has been a major supporter of the Sanctions Reform Act and was involved in drafting the legislation. *See Debate on the Sanctions Reform Act*, 144 Cong. Rec. H2342-02, H2344-46 (April 28, 1998). The failure of the Sanctions Reform Act to address state and local selective purchasing laws reflects a recognition that there is no more support in Congress for preempting these laws now than there was in 1993 when Congress refused to preempt state and local South Africa laws.

In addition to the numerous occasions on which Congress has considered and refused to preempt state and local selective purchasing laws, Congress has also specifically precluded *any* private lawsuits such as NFTC's challenge to the Massachusetts Burma law from being brought in connection with World Trade Organization (WTO)

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[8] *See* Hon. Lee H. Hamilton of Indiana, *Introduction of the Sanctions Reform Act, H.R. 2708*, 143 Cong. Rec. E2080 (October 23, 1997):

> . . . roughly 20 States and localities have adopted laws prohibiting government commercial dealings with United States or foreign companies that do business with countries that have poor human rights records. . . . [S]ome of [these] state and local sanctions raise difficult questions concerning the constitutional authority to conduct U.S. trade and foreign policy.

See also 144 Cong. Rec. E1291-03, S1292 (1998) (statement of Rep. Hamilton); 144 Cong. Rec. S8165-01, S8186 (1998) (statement of Sen. Lugar).

[9] *See* 145 Cong. Rec. S3457-01, S3504 (1999) (statement of Sen. Lugar); 143 Cong. Rec. S11964-02, S11999 (1997) (statement of Sen. Lugar).

disputes.[10] This preclusion includes both *direct* assertions of trade agreements as causes of action and *indirect* use of trade complaints in support of constitutional claims based upon Congress's power to regulate foreign commerce.[11] Congress thus anticipated, and acted to preclude, exactly the type of challenge brought by NFTC in this case. Nonetheless, both the district court and the court

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[10] *See* Uruguay Round Agreements Act of 1994 (URAA), P.L. 103-465, § 102; 19 U.S.C. § 3512. Specifically, the URAA: (1) precludes any private cause of action based upon WTO obligations (19 U.S.C. § 3512(c)(1)(A)); (2) reserves to the U.S. government the exclusive right to ask a domestic court to preempt state or local law that violates one of WTO agreements (19 U.S.C. § 3512(e)(1)(B)); and (3) provides a formal process of consultation with states and notice to Congress if the United States decides to take legal action against a state or local government (19 U.S.C. § 3512(b)(2)). *See also* 19 U.S.C. § 3512(c)(2) ("It is the intention of Congress . . . *to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements*") (emphasis added).

[11] *See* Statement of Administrative Action for the Uruguay Round Agreements Act (SAA), reprinted in 1994 U.S.C.C.A.N. 4440, at 20:

> Congress will have "occupied the field" with respect to any cause of action or defense that seeks directly *or indirectly*, the private enforcement of those agreements. That means that private parties may not bring suit or raise defenses:
>
> - directly under those agreements;
> - on the basis of a successful judgment against a state in a suit brought by the Attorney General under the agreement; or
> - *on any other basis, including Congress' Commerce Clause authority.*

(emphasis added) The SAA was drafted by the Executive Branch and approved by Congress. The URAA provides that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application. 19 U.S.C. § 3512(d).

of appeals cited the complaints of the European Union and ASEAN in ruling against the Massachusetts Burma law. *See* Pet. App. at 24-26, 81-82. By relying on the complaints of our trading partners to establish an encroachment upon the federal foreign affairs power, the lower courts thus not only disregarded Congress's *implicit* consent to state and local selective purchasing laws, but also its *explicit* prohibition on actions brought in connection with trade disputes.

The court of appeals' disregard of Congress's decision not to preempt state and local selective purchasing laws conflicts with this Court's decision in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994). In *Barclays Bank,* this Court recognized that the federal courts should not seek to displace the authority of Congress to determine whether and when to preempt state laws on foreign affairs or foreign commerce grounds.

II. Under *Barclays Bank*, the Federal Courts Should Defer to Congress's Constitutional Authority to Determine Whether to Preempt State Law Based Upon Foreign Commerce or Foreign Affairs Considerations

This Court has recently expressed a reluctance to read implicit limitations on state power into the Constitution:

> [I]n view of the Tenth Amendment's reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people, the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers.

Alden v. Maine, 119 S.Ct. 2240, 2259 (1999), *quoting Nevada v. Hall,* 440 U.S. 410, 425 (1979).

The court of appeals, however, relied heavily on *Zschernig v. Miller*, 389 U.S. 429, 440 (1968), which

held that in addition to the explicit limits on state sovereignty,[12] the Constitution implicitly precludes certain state and local measures that implicate foreign affairs. *See* Pet. App. at 14-41.

Yet since *Zschernig* was decided in 1968, this Court has substantially redefined its position on the separation of powers related to foreign commerce and foreign affairs. Most recently, in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.,* 512 U.S. 298 (1994), the Supreme Court held that Congress, not the courts or the executive branch, is the branch of government primarily responsible for determining whether to preempt state or local law based upon foreign affairs or commerce clause complaints. *See id.* at 327-28.

This Court rejected a claim that California's use of worldwide income reporting for the taxation of multinational corporations violated both the foreign commerce clause and the *Zschernig* foreign affairs doctrine. *See, e.g.,* Petitioner's Brief for Barclays Bank PLC, at 32, 42-43, 1993 WL 639306 (December 15, 1993) (asserting *Zschernig*). Writing for the Court, Justice Ginsburg noted that Congress had repeatedly declined opportunities to preempt the states from using worldwide tax reporting (512 U.S. at 325-27) and indicated that claims that a state law interferes with federal control over foreign commerce and foreign affairs will not invalidate the law when "Congress has focused its attention on th[e] issue, but has refrained from exercising its authority to prohibit state-mandated [measures]." 512 U.S. at 329.

The Court in *Barclays* explicitly stated that Congress *may* "passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uni-

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[12] *See, e.g.*, U.S. Const. art. I, § 10.

formity is essential' . . . ." 512 U.S. at 323 (citation omitted). Justice Scalia noted in his concurring opinion that the majority's decision in *Barclays* "requires no more than legislative inaction to establish that 'Congress implicitly has permitted' the States to impose a particular restriction on foreign commerce [and] restores the power to Congress" to determine whether to preempt state law. 512 U.S. at 332. Although this Court has not yet revisited the issue, Justice Scalia's assessment of the significance of *Barclays* is now widely accepted. Virtually all the commentators who have addressed the issue have concluded that *Barclays* deference to congressional authority either severly limits or effectively overrules *Zschernig*.[13] Louis Henkin, the preeminent authority on foreign affairs law, has similarly questioned *Zschernig's* continued viability. *See* Louis Henkin, FOREIGN AFFAIRS AND THE

[13] *See* Curtis A. Bradley and Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675, 678 n.23 (1998) ("*Barclays* may have eliminated the remnants of the dormant foreign affairs preemption doctrine announced in *Zschernig*"); Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT'L L. & POL'Y 405, 468 n.247 (1997) (*Barclays* "revers[es] [the] tendency of dormant preemption in *Zschernig*"); Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 865 (1997) (discussing *Barclays* and concluding that "there are reasons to think that *Zschernig's* dormant foreign relations preemption retains little, if any validity"); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 25 (1995) ("*Barclays Bank* proceeds on the principle that Congressional acquiescence in a state practice affecting the commercial aspect of foreign relations is sufficient to validate that practice even if its negative effect on American dealings with other countries is demonstrable"); Brenda S. Beerman, *State Involvement in the Promotion of Export Trade: Is it Time to Rethink the Concept of Federalism as it Pertains to Foreign Relations?* 21 N.C.J. INT'L L. & COM. REG. 187, 197-98 (1995) ("*Barclays Bank* . . . implies that the Court will uphold state practices whenever there are passive indications that Congress has found them to be unobjectionable").

UNITED STATES CONSTITUTION, 165 note (2d ed. 1996) ("One would be bold to predict that [*Zschernig*] has a future life; might it remain on the Supreme Court's pages, a relic of the Cold War?")

The case presented by the plaintiffs in *Barclays* was remarkably similar to the NFTC's challenge to the Massachusetts law. The plaintiffs in *Barclays* "relied heavily on *Zschernig*, the enormous diplomatic controversy provoked by the [state] scheme, amicus filings from foreign nations alleging offense at the [state] law, and a variety of executive pronouncements." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1699-1700 (1997).

In this case, the court of appeals similarly relied on criticisms of the Massachusetts law by foreign governments. Pet. App. at 24-27. Yet this Court in *Barclays* emphatically rejected the argument that the complaints of foreign governments were relevant in determining the constitutionality of a state law:

> Barclays' and its amici's argument that California's worldwide combined reporting requirement is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum. The judiciary is not vested with power to decide "how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the states tax as they please."

Barclays Bank, 512 U.S. at 327-28.

The court of appeals in this case has construed *Zschernig* as providing authority for it to engage in just such a subjective policy decision in order to determine whether state or local legislation has an impermissible impact on foreign affairs. *See* Pet. App. at 23 (identifying five

factors that the court of appeals relied on in deciding that the Massachusetts law unduly affected foreign relations.) The court of appeals declined to find that *Barclays* rather than *Zschernig* was controlling, noting that any determination that the decision that *Zschernig* had been either limited or overruled should be made by this Court and not the lower federal courts.

CONCLUSION

Congress has consistently refused to preempt state and local selective purchasing laws, including the Massachusetts Burma law. The members of Congress submitting this brief urge this Court to accept Massachusetts' petition for certiorari in order to clarify the impact of *Barclays* on *Zschernig* and preserve the constitutional prerogative of Congress to determine whether to preempt state law on foreign commerce or foreign affairs grounds.

Accordingly, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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